IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1035 OF 2005

Gangadhar Narhari Kedare.
Occ.: Agriculture, Age: 65,
R/of Talegaon, Taluka Chandawad,
District Nashik. ... Petitioner

Versus.

Sou.Sonyabai Gangadhar Kedare.
Age: 54, Occ.: Nil,
R/of Dindori, Taluka: Nikphad,
District Nashik. ... Respondent.

Shri Peter Lobo with Shri Sachin D.Kadam for the Petitioner.

Ms.Rajeshree Gadhavi for the Respondent-State.

CORAM : ABHAY S. OKA, J.

DATED : 11th July, 2005.

ORAL JUDGMENT.:

1. On the last date the learned Counsel for the Petitioner was heard. Today the Petition is kept for dictation of the Judgment.

2. The Petitioner is the husband and the Respondent is the wife. The challenge in this petition is to the Judgment and order dated 18th January 2005 passed by the Additional Sessions Judge, Niphad.

3. The Respondent-wife had initially filed an application under section 125 of the Code of Criminal Procedure, 1973, for maintenance against the Petitioner.

The said Application was decided by granting monthly allowance of Rs.250/- in favour of the Respondent. An Application was made under section 127(1) of the said Code by the Respondent for enhancement of the monthly allowance. The learned Judicial Magistrate First Class enhanced the monthly maintenance allowance to Rs.1000/- from the date of passing of the order. The said order was challenged by the Petitioner and the Respondent by filing separate Revision Applications. The Revision Application preferred by the Petitioner was rejected by the impugned Judgment and order and the Revision Application preferred by the Respondent was allowed. The Additional Sessions Judge directed the Petitioner to pay maintenance at the enhanced rate of Rs.1200/- per month to the Respondent from the date of the application along with costs of Rs.1000/-.

4. Shri Lobo appearing for the Petitioner submitted that under section 127(1) of the said Code, the Court has power to award maintenance at enhanced rate from the date of passing the order and the Court has no jurisdiction to direct the payment of maintenance at enhanced rate from the date of filing the application under section 127. He placed reliance on the decisions of various High Courts. The said decisions are AIR 1949 Calcutta page 584 (J.H.Amroon v/s. Ms.R.Sasoon); 1982 Cr.L.J. page 1081 (Bansi Lal v/s. Pushpa Devi); and 1998 Cr.L.J. page 1922 (Pilli Venkanna v/s. Pilli

Nookalamma & another). Placing reliance on the said decisions, he submitted that power to grant maintenance from the date of making application could have been exercised only while considering the original application under section 125 of the said Code and while considering application under section 127, the Court is powerless to do so in view the law laid down by various High Courts. Lastly he submitted that on merits also there was no warrant to enhance the maintenance amount to Rs.1200/-.

3. I have considered the submissions. The Application under section 127(1) of the said Code was filed in the year 1999. The main ground on which the application under section 127 was filed is that the Petitioner was getting monthly salary of Rs.9000/- and the Petitioner opted for voluntary retirement and has got a sum of Rs.5 lakhs towards provident fund and other dues. It is the contention of the Respondent that over and above the said amount of Rs.5,00,000/- he is getting monthly pension of Rs.5000/-.

4. Sub-section (1) and (2) of section 127 of the Code of Criminal Procedure, 1973 reads thus:

> "127. Alteration in allowance. - (1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly

allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.

. Provided that if he increased the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly."

It will be necessary to refer to section 489 of the Code of Criminal Procedure 1898. Section 489 consists of two clauses which read thus:

"489. (1) On proof of a change in the circumstance of any person receiving under section 488 a monthly allowance, or ordered

under the same section to pay a monthly allowance as he thinks fit: Provided that if he increases the allowance the monthly rate of five hundred rupees in the whole be not exceeded.

. (2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly."

Thus, on plain reading, there is no material difference between sub-sections (1) and (2) of section 127 and the two sub-sections of section 489 of the old Code. The only change which is brought about is by the insertion of sub-sections (3) and (4) in section 127 of the Code. Sub-sections (3) and (4) do not deal with the power of the Court to pass order for payment of monthly allowance from the date of making application or from the date of passing of the order. The scope of the power of the Court under section 489 of the old Code has been considered by a decision of the Division Bench of this Court reported in AIR 1926 Bombay page 419 (Hiralal Valavdas v/s. Bai Amba). The relevant portion of the said decision reads thus:

"Macleod, C.J. - This is an application in revision against the order of a Magistrate increasing the maintenance allowance of the applicant Bai Amba, under S.488 of the Criminal Procedure Code, from Rs.8-4-0 to Rs.18 per mansem, **the order to take effect retrospectively from the date of the application.**

. It has been argued that the Magistrate had no jurisdiction to make the order. Under S.488, the Magistrate has power to make the maintenance payable from the date of the application. We cannot see why he should not have the same power to direct, if he thinks fit, when an application is made to vary the order as regards the maintenance payable, that maintenance at the increased rate should be paid from the date of the application."

(Emphasis supplied).

Thus, the decision of the Division bench of this Court is that there was a power vesting in the Court while dealing with application under section 489 to pass an order directing payment of maintenance allowance from the date of making the application.

5. On plain reading of section 125 and 127 of the Code it is apparent that these sections are pari materia with sections 488 and 489 respectively of the old Code. Under section 127(1) of the said Code, the monthly allowance fixed under section 125 can be altered on proof of a change in the circumstances of any person receiving monthly allowance. Thus power of the Court under section 127 is not distinct and separate from the power under section 125 of the said Code. Under section 125(1) the Court can make the maintenance payable from the date of making Application as the liability of the opponent to pay maintenance exists on the date of filing of the Application. If the Applicant makes out a case of existence of change of circumstances on the date of making an Application under section 127, the Applicant is obviously entitled to maintenance at enhanced or varied rate from the date of the said Application. The Applicant cannot be denied maintenance at enhanced rate from the date of Application merely because the Court takes time to decide the Application. Therefore, if a case is made out under section 127(1) of the Code that there is change of circumstance on the date of the application, in a given case, the Court has power to grant monthly allowance from the date of the application. It all depends on the facts and circumstances of the individual case. Therefore, there is no merit in the first submission made by the learned Counsel for the Petitioner. In view of binding decision

of a Division Bench of this Court, I have not referred to the decisions of the other High Courts relied upon by the Petitioner.

5. In so far as the second submission is concerned, both the Courts below have considered the relevant material on record. The learned Magistrate while dealing with the application of the Respondent came to the conclusion that the annual income of the Petitioner was Rs.50 to 75 thousand. Apart from that, the Court considered the fact that the Petitioner was possessing two acres of irrigated land. Considering all these facts, the monthly allowance at the rate of Rs.1200/- has been fixed which is made payable from the date of filing of the application. There is no perversity in the order of the Courts below. There is no merit in the petition and the same is rejected.

Judge.